V. PROCEDURAL CONSIDERATIONS

A. Local Rules For Rate Regulation Must Be Consistent With FCC Regulations

The 1992 Act requires that the franchising authority adopt rules "that are consistent" with FCC regulations. NATOA, however, seeks to permit local rate regulation procedures that are different than the FCC rules, unless they "substantially or materially interfere with the Commission's rules or Section 623," or "only where they are irreconcilable with the rules or statute." NATOA at 28. In essence, NATOA seeks the Commission's blessing to whipsaw cable operators between widely varying regulations, even in adjacent communities. To ease the administrative burden on all parties, as required by the statute, the Commission should clarify that local regulations need to be, at a minimum, substantially similar to the FCC regulations. Continental should not have to accommodate a different set of procedural rules in each of the 600 communities it serves.

Under the statute franchising authorities must certify to the FCC that they will regulate rates under local procedures that are "consistent" with the Commission's. To be "consistent" means a great deal more than the failure to obstruct. City of New York v. FCC, 486 U.S. 57 (1988) (affirming FCC decision that local rules imposing more exacting technical standards are not consistent with FCC standards). Where the FCC prescribes specific standards and procedures, the local franchising authority must follow it.

B. The Date Of "Initial Regulation" May Not Be Uniform

Section 623 states that a subscriber is entitled to a refund of tier charges only for charges paid after the date on which a complaint is filed. The date of regulation for basic service is established in the statute as the date on which the franchising authority is certified and has the necessary rules in place. Rates for satellite tiers are regulated only upon complaint.

The 1992 Act does not permit the Commission to disregard this bifurcated system of regulation and impose a single date for regulation of both basic and tier rates. The Commission may not, as NATOA suggests, impose the earlier date of regulation for either basic or tier as a uniform date of regulation. It also may not adopt the suggestion of King County to ignore the statutory command for ad hoc regulation of satellite tier rates and impose a single uniform October 1, 1993 date of regulation.

Refunds may only be ordered for rates collected after the date of regulation. King County's efforts to reach back and refund charges predating regulation (King County at 19-21) violates the Act and due process. Section 623 only mentions refunds for satellite tier rates, and directs the Commission to adopt procedures to be used "to refund such portion of the rates or charges that were paid by subscribers after the filing of such

§ 543(c)(1)(C) (emphasis added). Current rates for basic service have been frozen since April 1993, and are completely lawful. The Commission may not order a refund of payments made prior to filing of a complaint and prior to the effective date of the rules.

C. Franchising Authorities May Not Initiate Cost Of Service Proceedings

According to the FCC, if rates are within the benchmarks, consumers have the same benefits as if competition existed. If franchising authorities are permitted to initiate cost of service proceedings on their own motion, the administrative convenience and efficiency of the benchmark system is nullified. The universally recognized burdens and costs of cost of service proceedings will become the norm. The only real beneficiaries will be municipal consultants like King County's advisors, Miller & Holbrooke, and NATOA's consultants, Arnold & Porter.5/

Franchising authorities would arrogate the power to be police officer, prosecutor, and judge as to basic rates, with FCC review limited to a check for "mere rationality." The suggestion

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5/ King County and Bell Atlantic ask the Commission to apply full Title II cost-based regulation to cable. Section 621(c) of the Cable Act plainly prohibits application of Title II common carrier regulation to cable service as ignores the statutory command for administrative simplicity and the prohibition against Title II regulation for cable television. The 1992 Act does not permit municipal authorities to initiate cost of service proceedings.

D. FCC Rules Must Be The Minimum Protection For Proprietary Information Supplied To Franchising Authorities

The FCC FOIA procedures recognize the value of proprietary information to the cable operator, and provide a minimum level of protection. State and local authorities may provide greater protection than the FCC procedures, but the federal guidelines act as a floor.

Rate regulation is wholly dictated by the Cable Act, and franchising authorities must certify that they will follow the federal regulations. Any state or local regulations that provide less protection must be preempted. Otherwise, competitors will obtain this information to the detriment of cable operators. Many states' open records laws do not provide adequate protection to confidential business information. Unless the Commission mandates that FOIA protections are the minimum appropriate in rate cases, we can look forward to a string of cities forcing cable operators to choose between compensatory rates and public dissemination of trade secrets. Because cable operators have the right to federal rate protection, preemptive FOIA standards are an essential requirement of local rate procedures.

E. **<u>Rate And Service Agreements Are Permissible But Not Preempted</u>**

Continental agrees that, in many respects, mutual agreements regarding rates and services are the best solution. Continental has enjoyed and worked toward good relationships with many franchising authorities over the years. Thus, before the 1984 Cable Act, cities such as Richmond, Virginia and Lansing, Michigan had <u>voluntarily</u> deregulated Continental's rates.

Under the 1992 Act, such agreements are gentlemen's agreements. Each party agrees to act in a certain way if the other acts in a reciprocal manner. Either party can terminate the agreement (and invoke federal procedures for regulation) at will. For example, a cable operator and franchising authority could agree that a system's rate would be frozen so long as the city does not seek to regulate basic rates; or, the operator could agree to cap its rate increases at cost of living.

The Commission should permit such agreements. Otherwise, the 1992 Act would be construed to unnecessarily create adversarial relationships.

VI. THE FCC SHOULD RETAIN ITS CURRENT INTERPRETATION OF "EFFECTIVE COMPETITION"

In first round Comments, NATOA and its municipal allies pressed hard to define effective competition so narrowly that they would retain regulatory control over cable even when a host of unregulated competitors had achieved far more than a 15% market share. NATOA argued that SMATVs should not "count" as competitors; that multichannel competition is ineffective unless it has the same number of channels as cable; and that the Commission should ignore the franchise areas established by these very franchising authorities when measuring "homes in the franchise area." The Commission properly rejected such proposals, but NATOA has returned on reconsideration with the same prayers, and with no new evidence or argument. The Commission should retain its present definition of effective competition.

A. SMATV/TVRO Services Available Nationwide

SMATV and TVRO are competitive forces that are "available" and "everywhere." The major players in the "private cable" arena have demonstrated that they will go anywhere in the contry to serve lucrative MDUs. See, e.g., SMATV News, Dec. 31, 1990 at 5 (Paul Kagan Assocs. Inc.). The FCC and Congress have acted to open up SMATV competition by excusing SMATV from franchising requirements in many cases, by offering microwave interconnection, and by mandating access to programming. SMATV and TVRO are "available" in the same way that a full power broadcast station is available within its predicted Grade B contour, or a wireless cable operator is available within its interference-free contour.

B. "Comparable" Programming Cannot Mean The Same Number of Channels

NATOA proposes a standard in which only a cable competitor with ± 20 percent of the number of satellite channels offered by the cable operator would count as "competitors." NATOA at 20.

In the first place, this would eliminate even highly effective competitors like wireless cable in Riverside County, California as "effective" competitors, because the number of available MMDS channels is less than the average number of cable channels on an average system. See Reply Comments of Continental Cablevision, MM Docket 92-266 (February 11, 1993) at 3-6 (wireless cable maximum 33 channels compared to average cable system 41 channels). Moreover, a multichannel competitor with mandatory access to satellite programming services with the highest viewing shares (the top five cable networks together account for a clear majority of all satellite cable viewing[6/]) present formidable competition to cable, regardless of the number of channels.

6/ See 2nd Quarter Cable Ratings: 1993 vs. 1992, Broadcasting & Cable Magazine, July 19, 1993 at 28 (chart).

C. A Cable Operator That Serves Less Than 30% of All Households In Its Franchise Area Faces "Effective Competition"

The complaint of those commenters seeking reconsideration of the 30% penetration standard is really a complaint that these areas have insufficient demand for cable television services. A cable operator most certainly will construct its cable system throughout a franchise area if subscriber demand exists. Conversely, an operator is unlikely to construct its system in areas lacking subscriber demand. This is classic rational economic behavior. Contrary to NATOA's suggestion, a cable operator has no motivation either to decline service to an area for rate regulation purposes -- the entire premise of the business is to maximize subscribership.

The current interpretation of 30% penetration is mandated by Section 623. The statutes defines effective competition to include such systems where "fewer than 30% of the households in the franchise area subscribe to the cable service of a cable system." 47 U.S.C. § 543(l)(1)(A) (emphasis added). Ironically, the franchising authorities are the ones who issued the franchise, negotiated line extension requirements, and defined the "franchise area" for the cable system. They now want the Commission to rewrite their franchises and the plain language of the statute. The Commission should reject these suggestions.

VII. ONLY REGULATED FRANCHISE AREAS MAY BE SUBJECT TO UNIFORM RATE STRUCTURES

King County asks the Commission to interpret the statutory requirement for a uniform rate structure so as to govern the rates in all communities served by a system, whether or not subject to effective competition. (King County at 16-17). This is nothing less than a request for the Commission to impose rate regulation in those communities subject to actual market discipline. The proposal flagrantly disregards Section 623's command that cable systems subject to effective competition may not be regulated. The 1992 Cable Act and the FCC have consistently stated that effective competition is preferred to governmental regulation. Only those communities subject to rate regulation are governed by the uniform rate requirement.

VIII. COMMERCIAL LEASED ACCESS

The 1992 Act provides numerous avenues for third party programmers to gain access to cable television facilities. On a 36-channel cable system, six channels can be taken by local commercial broadcasters and three more channels by local non-commercial broadcasters, all for free. In addition, local franchisors can require a cable operator to set aside more free channels for PEG use. Finally, under commercial leased access, ten to fifteen percent of available channels must be provided to unaffiliated programmers. Cumulatively, these access provisions represent an enormous percentage of a cable operator's capacity that has cost millions of dollars to build and more to operate.

Before the ink is even dry on the Commission's commercial leased access rules, prospective commercial lessees, having already taken for granted Congress' largesse, are squabbling among themselves over which should get more favored access to the leased channels.[7/] Moreover, those petitioners urge self serving and flawed interpretations of the rate setting and dispute resolution process, which the Commission so painstakingly established after thorough consideration of the comments and reply comments in this proceeding.

Continental urges the Commission to retain the maximum implicit net fee formula with no special content based subsidies, with the clarifications set forth below. The Commission should reject first-come first-serve access, as well as special minority or educational set asides. Terms and conditions for carriage must be left to negotiation between the parties. The Commission's new expeditious dispute resolution procedures can effectively handle disputes that arise.

7/ The following parties filed petitions for reconsideration dealing exclusively with commercial leased access issues: ValueVision International, Inc., Center For Media Education Association of Independant Video and Filmmakers et. al. ("MEA"), SUR Corporation and Paradise Television Network, Inc. ("PTN"). Of these petitioners, only MEA even bothered to file comments in the Commission's rulemaking proceeding. MEA's petition is largely a rehash of arguments previously considered and properly rejected by the Commission.

A. The FCC Should Retain The Highest Implicit Net Fee Standard

The highest implicit net fee standard ("HINF") is the correct methodology for establishing maximum reasonable rates for leased access. HINF properly accomodates Congress' expressed purpose of promoting competition in video programming and assuring the widest possible diversity of information sources "in a manner consistent with growth and development of cable systems". 47 U.S.C. § 532(a) (emphasis added). Congress' concern about the potential burden of leased access on cable operators is underscored by the directive that FCC rules governing price, terms and conditions must be "at least sufficient to assure that such use will not adversely affect the operation, financial condition or market development" of cable systems. 47 U.S.C. § 532(c)(1). After reviewing comments in this proceeding the FCC properly concluded that migration of cable programming services to leased access was a significant threat to the cable industry's financial condition and development if rates were set too low.

Moreover, Congress intended that cable operators receive a fair profit from "commercial" leased channels:

> Nothing in these provisions is in any way intended to deprive a cable operator from receiving a fair profit from the use of this designated channel capacity.

1984 House Report at 52 (emphasis added). By setting maximum rates at the HINF, negotiated at arms-length, with unaffiliated programmers, the Commission has also satisfied this second congressional objective. R&O at ¶ 519. 8/

There is no basis for setting rates below the HINF for any special class of programmer. See MEA Petition at 11-13; SUR Petition at 5-8. First, the HINF is merely a maximum from which lower rates can be negotiated. R&O at 519. More importantly, at issue are the rates for commercial leased access. Educational entities have ample subsidized access both on cable systems (must carry, PEG, Section 612(i)), and through other media outlets (i.e. ITFS). Minority programmers receive special preferences in broadcast licensing with PEG and the Section 612(i) minority provisions providing more than adequate subsidized minority outlets.

B. Clarifications To HINF Calculation

Continental agrees that the Commission should clarify the HINF calculation, but in so doing should reject efforts by Petitioners to secure below market pricing. Congress specifically intended cable operators to receive a fair profit from

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8/ MEA misconstrues the Commission in asserting cable has a monopsony relationship with programmers. MEA Petition at 3-4. The Commission has never found such a relationship exists. Paragraph 519 of the Report states only "[n]otwithstanding the possible existence of a monopsony relationship . . ." (emphasis added). If any distortion of program prices exists it is certainly not on the high side. Congress' program access requirements guarantee alternative video program distributors cable programming on a nondiscriminatory basis to obtain programming at cables' more favorable rates. Cable Act Section 19. Thus, any distortion in program pricing would logically favor lessees.

leased channels.[9/]

1. Shopping Channels

The Commission should reject ValueVision's effort to secure access at below market rates. The market price for shopping channels is not 5 percent of sales as ValueVision asserts: rather, it is the actual revenue that percentage represents, plus subscriber channel charges. ValueVision Petition at 3. Established networks like QVC and HSN have sufficient sales volume to justify a 5 percent commission formula. If sales volume were lower, the channel charge, if expressed as a percentage, would be correspondingly higher. Five percent of 0 is 0, and it is clear that Congress did not intend to require cable operators to accept below market or unprofitable rates for unsuccessful leased channels.[10/]

9/ Consequently, observations such as that by MEA below are clearly illegal, in addition to being absurd on their face:

> [T]here is no evidence that the cable operators need such rents to survive. Leasing 10-15% of its capacity to pro-

Shopping lessees should also pay the same channel charge applicable to the "all other" and pay program categories. As discussed in the Report and Order the HINF "uses the subscriber rates for basic, cable programming and premium services.

enhanced.

2. <u>Miscellaneous Pricing Issues</u>

SUR urges that the HINF for premium service be modified to apply the fee to the actual number of subscribers that take a leased access premium service. SUR Petition 5-8. Thus, according to SUR, a service with 100 subscribers could occupy an <u>entire</u> channel on a cable system with <u>any</u> number of subscribers for $150 per month. SUR Petition at 6. This is ludicrous. The HINF formula already applies a penetration factor in each program category. Consequently there is no logical basis for further reducing the rate due the cable operator by allowing premium programmers to pay only for actual subscribers to its service. This simply rewards bad programmers, and ignores the substantial

C. First-Come First-Served Access Should Be Rejected

Cable operators should not be required to provide leased access on a first-come first-served basis. If so required, for example, Continental would be powerless to prevent the occupation of numerous leased access channels by home shopping programmers while other potential, diverse lessees later were shut out. Moreover, other diverse cable programming would be forced off a system to accommodate the duplicative shopping lessees. Such a requirement would also conflict with the statutory prohibition against regulating cable as a common carrier. 47 U.S.C. § 541(c).

Nowhere in the statute is there authority to divest cable operators of all control over the nature of commercial leased access programming. Clearly, content can be considered in rate setting for commercial leased access. In addition, the overriding purpose of Section 612 is to promote diversity. The 1984 House Report observed:

> Thus, in establishing price, terms and conditions pursuant to this section, it is appropriate for a cable operator to look to the nature (but not the specific editorial

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[Footnote Continued]

mula compares all unaffiliated programmers within a category regardless of whether more than one tier is involved. PTN's concern is misplaced because the HINF of a programmer on a tier is automatically discounted by tier subscriber penetration under the HINF formula. See PTN Petition 9-10.

> content) of the service being proposed, how it will affect the marketing of the mix of existing services being offered by the cable operator to subscribers, as well as potential market fragmentation that might be created and any resulting impact that may have on subscriber or advertising revenue.

1984 H.R. Rep. at 51. It is clear that the cable operator retains discretion, not tied to specific editorial content, to control lessee access.14/

D. Negotiation Of Terms And Conditions

The Commission has established requirements governing technical standards and support, billing and collection services, and security deposits. It properly refused to set specific requirements for lease term, channel and tier placement, and time of carriage. These are matters that will be influenced by individual circumstances best resolved through negotiations. For example, MEA proposes to require cable operators to lease a channel for the term proposed by the lessee - up to 15 years. MEA Petition for 15 n.11. This would obviously be unworkable and seriously undermine Congress' goal of increasing program diversity by locking out new programmers for extended periods. Cable

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14/ SUR's view that leased access is intended as a vehicle for minority and educational programing is clearly erroneous as those programmers have numerous other favored access rights under the statute and FCC rules. *See* page 24 *supra*. SUR's elaborate and unworkable request for special minority access must be rejected because it has no statutory support and it would thrust the cable operator deeply into prohibited editorial judgments.

operators are merely required to establish terms and conditions that provide lessees a "genuine outlet" for programming, and the Commission has adopted remedies to ensure this result. R&O at ¶ 498.

E. The Dispute Resolution Procedures Are Fair And Effective

The Commission's rules ensure that complaints will be timely filed, and that cable operators will respond promptly. 47 C.F.R. § 76.975. Lessees that desire carriage can secure it during the pendancy of a dispute subject to refunds if the Commission rules in their favor. No changes to the rules are justified or required.

MEA badly misconstrues the burden of proof on lessees, which as interpreted by the Commission, is extremely lenient. MEA Petition 17-21. For the complainant to satisfy its burden regarding a rate issue, it need only allege that the rate is excessive. R&O ¶ 534 n.1350, n.1357. The cable operator would then be required to demonstrate compliance. The Commission would be permitted to seek additional information from the cable operator, if necessary. 47 C.F.R. § 76.975(e). This is hardly a burdensome process for any complainant.

CONCLUSION

For the foregoing reasons, Continental asks the Commission to deny the petitions for reconsideration of NATOA, King County, and other municipal and commercial leased access commenters, and to grant reconsideration as set forth in Continental's June 21, 1993 petition.

Respectfully submitted,

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July 21, 1993

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of July, 1993, copies of the foregoing Opposition to Petitions for Reconsideration were sent by postage-paid, first-class U.S. mail to the following:

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